In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-852

EDWARD J. GRASAVAGE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence derived from a court-authorized wire interception should have been suppressed because the application therefor was approved by Richard Kleindienst at a time when he was not empowered to act as the Attorney General.

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners Edward and Pauline Grasavage were convicted of conspiring to conduct and of conducting an

illegal gambling business, in violation of 18 U.S.C. 371 and 1955; after a different jury trial in the same district petitioner Robert Rinaldi was convicted of the same offenses for his participation in an unrelated illegal gambling business. Petitioners received the following sentences: Edward Grasavage, five years' probation and a $5,000 fine; Pauline Grasavage, three years' probation and a $5,000 fine; Rinaldi, three years' probation and a $1,000 fine. The court of appeals consolidated the two appeals and affirmed (Pet. App. A).

The facts are not in dispute. Evidence from a single court-authorized wire interception established the existence of two separate illegal gambling businesses, one involving the Grasavages and others, and one involving Rinaldi and others. The application for the court order was authorized pursuant to 18 U.S.C. 2516(1) on April 24, 1972, by Richard G. Kleindienst, who, as the Deputy Attorney General, had assumed the office of Acting Attorney General on March 1, 1972, upon the resignation of Attorney General Mitchell.[1]

Petitioners claim that since the Vacancies Act, 5 U.S.C. 3345, 3348, limits to 30 days the time in which a first assistant may, without congressional authorization, act as the head of an executive department upon a vacancy in that position, the authorization by Kleindienst, which occurred more than 30 days after

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[1] Kleindienst was confirmed by the Senate as Attorney General on June 8, 1972, and was sworn in four days later (Pet. 6-7, 13).

he became Acting Attorney General but before he had been confirmed as Attorney General by the Senate, was *ultra vires.*

It is well-settled, however, that defendants in criminal cases have no standing to challenge the *de jure* authority of a *de facto* officer, and petitioners do not challenge Kleindienst's *de facto* status here. *Ex parte Ward*, 173 U.S. 452; *Starr* v. *United States*, 164 U.S. 627, 630-631; *McDowell* v. *United States*, 159 U.S. 596, 601; *In re Manning*, 139 U.S. 504; *United States* v. *Joseph*, 519 F.2d 1068, 1071 n. 4 (C.A. 5), certiorari denied, February 23, 1976, No. 75-600; *Gee* v. *Smith*, 479 F.2d 642, 645-646 (C.A. 5), certiorari denied *sub nom. Gee* v. *United States*, 415 U.S. 932; *United States* v. *Chaudron*, 425 F.2d 605, 611 (C.A. 8), certiorari denied, 400 U.S. 852; *Browne* v. *United States*, 145 Fed. 1, 4 (C.C.A. 2), certiorari denied, 200 U.S. 618; *United States* v. *Alexander*, 46 Fed. 728, 729-730 (D. Idaho). Cf. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 535-537.

In any event, whatever the merits of petitioners' claim that, by virtue of the Vacancies Act, Richard Kliendienst was not acting lawfully as the Attorney General when he approved the application, all of the purposes of the wire interception statute were fulfilled in this case, and there can be no reason to suppress the evidence gathered. Whether Kliendienst was lawfully the Acting Attorney General when he authorized the interception application, or whether by then his capacity to act in that position had expired and he was again only the Deputy Attorney

General, he was the "senior officer in the Department" (*United States* v. *Giordano*, 416 U.S. 505, 521). Accordingly, the objective of 18 U.S.C. 2516 (1)—to "centralize and limit" (416 U.S. at 523) the authority to approve wire interception applications—was fully satisfied when, as the highest official in the Department of Justice and one who was "responsive to the political process" (416 U.S. at 520),[2] Kliendienst approved the application at issue here. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2] Kliendienst had been confirmed by the Senate as Deputy Attorney General. See 28 U.S.C. 504.

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